TOPICAL INDEX

	Page
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statutory Provisions Involved	3
Statement of the Case	3
Reasons For Granting The Writ	5
Conclusion	7
Appendices	1a, 1b

TABLE OF AUTHORITES CITED

Cases

Page

Escobedo vs The State of Illinois, 378 U. S. 478, 492, 84 Sup. Ct. 1758, 1766 ..... 5, 6

Massiah vs U. S., 377 U. S. 204, 84 Sup. Ct. at 1202 ..... 5, 6

Walder vs U. S., 347 U. S. 62 ..... 6, 7

California Constitution

Section 6, Article 5 2

Codes

28 U. S. Code, Sec. 1257 (3) 2

Statutes

Section 23102 of the Vehicle Code of the State of California 1, 3, 4

Section 1471 of the Penal Code of the State of California 2

IN THE

Supreme Court of the United States

October Term - 1965

JAMES RUSSELL HEAPS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner JAMES RUSSELL HEAPS respectfully prays that the Supreme Court grant a Writ of Certiorari to review the Judgment of the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California, affirming without an opinion the Judgment of the Municipal Court of the Long Beach Judicial District, County of Los Angeles, State of California, convicting him of driving a motor vehicle while under the influence of intoxicating liquor in violation of Section 23102 of the California Vehicle Code, and presents this statement to show that the Supreme Court of the United States has jurisdiction of this Petition, and that a substantial Federal question exists.

JURISDICTION

The decision of the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California, was entered on the 26th day of May, 1965. A Petition for rehearing and/or for Certification to the District Court of Appeal of the State of California, was denied on June 4, 1965. No further Appeal is permissible under the California law; the Judgment is final. (California Constitution Sec. 6, Article 5; Sec. 1471 Penal Code of California) (added stats. 1961, c 693, p. 1935, Sec. 18, operative January 2, 1962)

The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1257 (3). The constitutional questions were originally raised in the trial court and assigned as error to the said Appellate Department of the Superior Court which ruled thereon, affirming the Judgment below without opinion.

QUESTIONS PRESENTED

1. Did the State of California deprive the Petitioner of due process and of a fair trial by permitting oral testimony over the objection of Petitioner, repeating an incriminating statement which was elicited from Petitioner by police officers after his arrest, but without advising him of his constitutional rights to remain silent and to be represented by legal counsel?

2. Did the State of California deprive the Petitioner of due process and of a fair trial by permitting oral testimony concerning the results of a field sobriety test, when such test was administered to Petitioner after the accusatory stage had been reached, and

without advising him of his constitutional right to remain silent and to be represented by legal counsel?

3. Did the State of California deprive the Petitioner of due process and fail to afford him equal protection of the law by allowing the objective evidence of his condition of sobriety to disappear before being advised of the right to counsel, thus hampering counsel in obtaining independent evidence of his condition at the time of arrest, which is a major element of the alleged crime?

CONSTITUTIONAL PROVISIONS INVOLVED

The Federal Constitution provisions invoked are the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

Statute involved is Sec. 23102 of the Vehicle Code of the State of California. (Appendix "A")

STATEMENT OF THE CASE

A police officer observed the Petitioner driving a vehicle upon the public streets in the City of Long Beach, State of California, and stopped him under suspicion of violation of Sec. 23102 of the Vehicle Code of the State of California.

The officer questioned the Petitioner as part of a field sobriety test, noting his manner of speech and as an additional part of said test had the Petitioner perform certain physical acts, such as walking away from the officer, turning upon command, and standing

with his heels and toes together, with his eyes closed and in the same position touch his nose with his forefinger. The Petitioner was placed under arrest for violation of Sec. 23102 of the Vehicle Code of the State of California, and transported to the Long Beach City Jail by two other police officers.

At the police station the Booking Sergeant administered a second field sobriety test similar to the one given by the arresting officer, and elicited a statement from Petitioner that he had had five martinis.

At no time from the time he was first stopped until he appeared in Court was the defendant advised by any officer that he had a right to remain silent; that he had a right to obtain or consult legal counsel; that any statement which he might make could be used against him in subsequent court proceedings; or that he was not compelled to be a witness against himself. During the taking of the field sobriety tests at the time of arrest and at the station, and at the time the aforesaid incriminating statement was elicited from him, Petitioner was not represented by legal counsel, nor had he been informed that he had a right to do so.

The Petitioner went to trial before a jury. At the trial the arresting officer testified as to his observations resulting from the field sobriety test, including defendant's manner of speech and further stated that in his opinion Petitioner was under the influence of alcohol. The Booking Sergeant also testified as to the results of the sobriety test given by him at the station, including the manner of defendant's speech, and also as to Petitioner's admission that he had had five martinis. All the foregoing evidence was admitted

over objections duly made by counsel for Petitioner, stating as to the grounds therefor, that such evidence was inadmissible because Petitioner had been deprived of his constitutional rights and guarantees. The foregoing facts were contained in the "Engrossed Statement on Appeal," an agreed and settled statement proposed by counsel for Petitioner and the Prosecuting Attorney, and approved by the Court for transmittal to the Appellate Department of the Superior Court of Los Angeles County. (Appendix "B")

REASONS FOR GRANTING THE WRIT

The Petitioner was denied due process of law and equal protection of the laws when he was not advised of his right to counsel as guaranteed in the Sixth Amendment. A defendant must be afforded his right to counsel as soon as "the process shifts from investigatory to accusatory stage". (*Escobedo vs. The State of Illinois*, 378 U.S. 478, 492, 84 Sup. Ct. 1758, 1766) "This is the stage when legal aid and advice were most critical to the Petitioner." (*Massiah vs. U. S.*, 377 U. S., 204, 84 Sup. Ct. at 1202) This is even more true in the instant case because the Petitioner's condition, which was a principal issue, was transitory. The critical stage is at the time of his arrest. A knowledgeable defendant could engage counsel who would preserve evidence of his condition by engaging independent specialists to examine him and testify at his trial. *Escobedo* also holds that it is not necessary that the defendant request counsel and be denied this right. The right to counsel is not waived by failure to request counsel. Where defendant does not request, and has not been advised of his

right, he cannot be deemed to have waived such right. The foregoing denial of due process and equal protection of the laws was prejudicial to Petitioner's case.

Petitioner was further denied due process of law and equal protection of the laws, in that having not been advised (1) that he had a right to counsel and (2) that he could not be compelled to be a witness against himself, he was induced to take the aforesaid sobriety test; an important part of such a test is the manner and context of answers by the accused to questions propounded by the officers. Again a knowledgeable defendant could demand the right to call counsel before proceeding further with any inquiry.

Likewise Petitioner's incriminating statement induced by the Booking Sergeant at a time when he was not advised of his right to remain silent or to be represented by counsel, deprived him of due process and equal protection of the laws. (*Escobedo vs. Illinois*, and *Massiah vs. U. S., supra*)

The theory of the trial court was that in spite of these cases, incriminating statements could be admitted for Impeachment purposes. However, no such admonition was given the jury. The Court in so ruling relied upon *Walder vs. U. S.*, 347 U. S. 62. However, this was a case in which evidence was obtained by illegal search and seizure. The fact that police officers could not use the evidence in its case in chief, but instead could use it only for limited purposes is sufficient deterrent to keep Peace Officers from making illegal search and seizure. Incriminating state-

ments are entirely different. If the principle set down in the *Walder* case were to apply, Peace Officers could first elicit incriminating statements to be used for limited purposes, then advise the defendant of his rights and try again. They would have lost nothing by the previous infringements on defendant's constitutional rights. This would encourage Peace Officers to refrain from informing a defendant of his rights until after at least some interrogation had been made. Not so with illegally obtained evidence, because once it has been obtained it cannot again be obtained.

CONCLUSION

In conclusion, upon the facts and the law it is respectfully urged that this Court grant this Petition, otherwise Petitioner will be deprived of his constitutional rights to a fair and impartial trial as provided by the Fourteenth Amendment, and legal counsel as guaranteed by the Sixth Amendment.

Respectfullly submitted,

STEPHEN A. PACE, JR., and
THOMAS W. COCHRAN

By Stephen A. Pace, Jr.
Attorneys for Petitioner

APPENDIX "A"

Section 23102, Vehicle Code of the State of California

MISDEMEANOR DRUNK DRIVING. (a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway. Any person convicted under this section shall be punished upon a first conviction by imprisonment in the county jail for not less than 30 days nor more than six months or by fine of not less than two hundred fifty dollars ($250) nor more than five hundred dollars ($500) or by both such fine and imprisonment and upon a second or any subsequent conviction by imprisonment in the county jail for not less than five days nor more than one year and by a fine of not less than two hundred fifty dollars ($250) nor more than one thousand dollars ($1,000). A conviction under this section shall be deemed a second conviction if the person has previously been convicted of a violation of Section 23101 of this code.

(b) Any person convicted of a second or subsequent offense under this section shall not be granted probation by the court, nor shall the court suspend the execution of the sentence imposed upon such person. (Stats. 1959, c. 3, p. 1707, 23102, as amended Stats. 1959, c. 1282, p. 3433, 1.)

APPENDIX "B"

IN THE MUNICIPAL COURT OF
LONG BEACH JUDICIAL DISTRICT
COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

JAMES RUSSELL HEAPS,

Defendant.

No. L 16237

ENGROSSED STATEMENT ON APPEAL

Defendant JAMES RUSSELL HEAPS hereby respectfully submits his Amended Proposed Statement on Appeal from conviction of violation of Section 23102 of the California Vehicle Code:

I

STATEMENT OF THE CASE

Date of arrest: August 11, 1964;

Date of complaint: August 13, 1964;

Charge: 23102 Vehicle Code, with a prior conviction alleged;

Date of arraignment: August 18, 1964;

Date of trial: November 4, 1964; by jury;

Judge presiding: Honorable JOHN C. SPENCE, JR.;

Verdict: Guilty;

Motion for new trial: February 19, 1965;

Judgment and sentence: February 26, 1965; five days, Long Beach City Jail and a fine of Two Hundred Fifty ($250.00) Dollars, plus the penalty assessment of Twenty-six ($26.00) Dollars, or an additional thirty days in the Long Beach City Jail;

Driving privileges suspended for one year.

II
PERTINENT FACTS

Officer R. W. RUSSELL, of the California Highway Patrol testified that he was east bound on Broadway, in Long Beach, behind the vehicle being driven by defendant on August 11, 1964, and noticed that the vehicle was being driven erratically. He testified that the vehicle weaved over the center double line several times and weaved back, nearly striking cars parked on the south curb line of Broadway; the vehicle then stopped for a red light at Orange, and at this time the Officer observed the defendant fall across his steering wheel and honk his horn in so doing; he further testified that just East of Orange the defendant realized that he was being followed by the motorcycle officer and leaned out of the driver's window looking backward and almost fell from the window of the moving vehicle. He then stopped the vehicle with the use of his red lights and the defendant pulled over erratically toward the right curb,

stopping his vehicle approximately 30 inches from the curb.

He asked the defendant to alight from the vehicle, which he did, and staggered as he did so. Defendant was then given a field sobriety test, consisting of walking and turning examination, which the defendant failed to pass, and was then given a balance test, balancing on one foot, which he failed, and the defendant refused to take any further tests.

Defendant was taken to the Long Beach City Jail and given an additional field sobriety examination by Sergeant F. Mayfield, which the defendant failed to pass. Sergeant Mayfield offered the defendant a Breathalyzer test or a blood test, both of which were refused. Defendant was then booked for violation of Section 23102 of the Vehicle Code.

At no time from the time defendant was first stopped, until after he had been booked was the defendant informed by any officer that he had a right to remain silent; that he had the right to have an attorney present with him, and that any statement which he might make could be used against him in court proceeedings. During the taking of the sobriety tests in the field and at the station, defendant did not have counsel with him, nor had he been informed that he had the right to do so.

Defendant entered a plea of not guilty and asked for a jury trial, and went to trial before a jury on or about November 4, 1964, and was convicted of the offense.

During his direct examination the defendant testified that he had had one or two drinks before his

arrest. On cross-examination the defendant was asked if it wasn't true that he told the Booking Sergeant that he had five martinis. The defendant answered that he could have so stated. This was objected to on the ground that the defendant had not been advised of his constitutional rights prior to this conversation. The court allowed this testimony on the theory that it was impeachment of the defendant, although the court had indicated earlier that no conversations with the defendants would be permitted during the trial in view of the fact that defendant had not been advised of his constitutional rights. Defendant further objected to the testimony concerning the sobriety tests in the field and at the station on the same ground; that defendant had been deprived of his constitutional rights by having not been advised concerning same by the arresting or other officers. This objection was overruled and the testimony was permitted.

Motion for a new trial was made and denied by the Court on Friday, February 19, 1965. The matter of sentence put over at the request of defendant, awaiting the results of the Supreme Court decision in the case of *People vs. Dorado*, and after the decision on the rehearing in *People vs. Dorado* in the California Supreme Court on February 26, 1965, defendant was sentenced to serve five days in the City Jail; to pay a fine of Two Hundred Seventy-six ($276.00) Dollars, with the penalty, and to have his driver's license suspended in accordance with the provisions of the Vehicle Code. A written Notice of Appeal was filed and execution of the sentence was stayed pending the Appeal, and defendant was released on his own recognizance.

This Appeal is from the Judgment of Conviction and from the whole thereof.

The sole ground of this Appeal is that the defendant was deprived of his constitutional rights by permitting the testimony concerning the field sobriety tests and the further sobriety test at the station and compelling the defendant to answer a question on cross-examination concerning statements allegedly made by the defendant to the Booking Sergeant. That since defendant was not advised of his constitutional right to remain silent and that he had a right to have counsel present, he was in effect required to give testimony against himself by taking the so-called sobriety tests in the field and at the station, and required to answer concerning a statement allegedly made by him to the Booking Sergeant.

DATED: April 6, 1965.

I hereby certify that the above is a full, true and correct Statement on Appeal in the above entitled case.

JOHN C. SPENCE, JR., Judge

No. 496

IN THE

Supreme Court of the United States

October Term - 1965

JAMES RUSSELL HEAPS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RETURN TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

JAMES T. STARR
Counsel for Respondent
207 Public Safety Building
Long Beach, California

STEPHEN A. PAGE JR. and
THOMAS W. OSCHEAN
Attorneys for Petitioner
[illegible]
Long Beach, California

TOPICAL INDEX

Page

Petitioner Was Not Denied The Effective Aid Of Counsel 1

Petitioner Was Not Denied Due Process of Law Because Oral Testimony Concerning The Objective Results of a Sobriety Test Was Allowed 2

There Was No Improper Introduction Into Evidence of An Incriminatory Statement of Petitioner 3

Conclusion 4

TABLE OF AUTHORITIES CITED

Cases

Page

Escobedo v Illinois, 378 U. S. 478, 12 L. Ed. 2d 977 ..... 2, 4

Walder v United States, 347 U. S. 62, 98 L. Ed. 503 3

IN THE

Supreme Court of the United States

October Term - 1965

JAMES RUSSELL HEAPS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RETURN TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITIONER WAS NOT DENIED THE EFFECTIVE AID OF COUNSEL.

Petitioner has set forth as one of the grounds for the Writ of Certiorari that he was denied equal protection of the law because the State of California allowed the objective evidence of his condition of sobriety to disappear. This is not true. Approximately two hours following petitioner's arrest, his counsel arrived at the city jail in the City of Long Beach, accompanied by a medical technician. This technician

was permitted to draw a sample of petitioner's blood for testing purposes to determine petitioner's state of sobriety.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BECAUSE ORAL TESTIMONY CONCERNING THE OBJECTIVE RESULTS OF A SOBRIETY TEST WAS ALLOWED.

Petitioner relies, for this ground, upon the case of *Escobedo v. Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977. The instant case is distinguishable upon its facts from that case. First, in *Escobedo* the court was dealing with a confession, while in the instant case we are dealing with objective physical symptoms. Second, in *Escobedo* the court held that the defendant must be afforded the right to counsel as soon as "the process shifts from the investigatory to the accusatory stage." There the court distinguished between the two phases of a case. What they were guarding against was a defendant implicating himself in a crime by his own statement without the advice of counsel after he had been taken into custody. In a case such as the instant one there necessarily must be some investigation into the suspect's condition. These "field sobriety tests" comprise that investigation. It is only after the results of these tests have been observed and an opinion reached by the examiner does the case shift to the accusatory phase.

It is submitted that unlike a confession wherein the defendant links himself to a crime, here the defendant is linked to the crime by the observations of a second party of the defendant's conduct.

THERE WAS NO IMPROPER INTRODUCTION INTO EVIDENCE OF AN INCRIMINATORY STATEMENT OF PETITIONER.

Petitioner states on page 4 of his petition that the Booking Sergeant testified to petitioner's admission that he had five martinis. This is not true. Reference is made here to the "Engrossed Statement on Appeal" filed in the Appellate Department of the Superior Court. (Appendix B of the Petition) There it will be seen that no statement made by the petitioner to the police was introduced against him. It was only after he testified on direct examination that he had had one or two drinks that he was asked on cross-examination if it wasn't true that he told the Booking Sergeant he had five martinis. The petitioner answered that he could have so stated. (See pages 3a-4b of Petition)

It is submitted that this is admissible since it is done for purposes of impeachment made necessary by the petitioner's own contradictory testimony. An analogous situation has been approved by the Supreme Court of the United States in *Walder v. United States*, 347 U.S. 62, 98 L. Ed. 503. That case involved unlawfully obtained evidence offered to impeach the defendant. The court stated:

> "It is one thing to say that the government cannot make affirmative use of evidence unlawfully obtained. It is quite another thing to say that the defendant can turn the illegal method by which evidence in the government's possession was obtained to his own advantage and provide him with a shield against contradiction of his untruths. Such an extension of the *Weeks* doc-

trine would be a perversion of the Fourth Amendment."

It is submitted that the same theory should apply here. A similar extension of the *Escobedo* doctrine to insulate the petitioner against contradiction of his own untruths would be a perversion of the Sixth and Fourteenth Amendments.

CONCLUSION

In conclusion it is urged that the petitioner was not denied Due Process of Law and the Effective Aid of Counsel and the Writ should be denied.

Respectfully submitted,

JAMES T. STARR
City Prosecutor

ROBERT W. PARKIN
Deputy